United States Senate
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS
WASHINGTON, DC 20510–6075

June 14, 2024

Mr. Michael J. Hsu
Acting Comptroller
Office of the Comptroller of the Currency
400 7th Street SW
Washington, DC 20219

Dear Acting Comptroller Hsu:

In January, the Office of the Comptroller of the Currency (OCC) announced a proposed rulemaking updating its bank merger review framework under the Bank Merger Act.[1] This proposed rulemaking represents a step towards the comprehensive overhaul of the bank merger review framework that is desperately needed. The rulemaking, as proposed, would eliminate an unnecessary loophole that allows certain mergers to be approved just by the passage of time. Second, and perhaps more importantly, the proposal includes a Policy Statement that sets out "chalk lines" clarifying when a merger application might be consistent or inconsistent with approval.[2]

Last year's bank failures coupled with an increasing trend towards concentration in the banking industry demonstrate the immediate need for the OCC, the other banking regulators,[3] and the Department of Justice (DOJ),[4] to collectively complete a comprehensive update of the bank merger review framework to ensure consumers, and not just Wall Street, benefit from these transactions. Below are observations about the strengths of the OCC's Policy Statement and opportunities for refinement. I urge the OCC to quickly adopt a strong final rule and Policy Statement to ensure that bank merger transactions receive adequate scrutiny.

[1] OCC, Acting Comptroller Discusses Bank Mergers, Jan. 29, 2024, https://www.occ.gov/news-issuances/news-releases/2024/nr-occ-2024-6.html; "Business Combinations Under the Bank Merger Act," Federal Register 89: 10010, Feb. 13, 2024, https://www.federalregister.gov/documents/2024/02/13/2024-02663/business-combinations-under-the-bank-merger-act (hereinafter, "Policy Statement").
[2] Acting Comptroller of the Currency (ACOC) Michael J. Hsu, "What Should the U.S. Banking System Look Like? Diverse, Dynamic, and Balanced," Jan. 29, 2024, https://www.occ.gov/news-issuances/speeches/2024/pub-speech-2024-6.pdf.
[3] "Request for Comment on Proposed Statement of Policy on Bank Merger Transactions," Federal Register 89: 29222, Apr. 19, 2024, https://www.federalregister.gov/documents/2024/04/19/2024-08020/request-for-comment-on-proposed-statement-of-policy-on-bank-merger-transactions.
[4] *See* Assistant Attorney General Jonathan Kanter Delivers Keynote Address at the Brookings Institution's Center on Regulation and Markets Event "Promoting Competition in Banking," June 20, 2023, https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-address-brookings-institution.

I. Scrutiny of Proposed Transactions' Community and Economic Impact

Frequently, when a merger or acquisition is announced, bank executives point to "synergies" and "economies of scale" that will be realized after a transaction is completed. But these synergies and economies of scale often translate into lost jobs, closed branches, and reduced access to banking services for consumers. Years of consolidation have hollowed out crucial financial infrastructure in communities across America. Half of all counties in the U.S. lost bank branches, on net, through the mid-2010s.[5] The story has been especially difficult for rural America, which lost 14 percent of its branches during that period.[6] Behind these numbers are small business owners who struggle to expand their businesses when their reliable banking partners leave town and consumers who can't easily travel long distances to a new branch.[7]

The Policy Statement begins to address these issues, but it must go farther. Overall, I am supportive of the Policy Statement's clarification that the proposed bank merger review process will include an assessment of the potential for job losses or reduced job opportunities resulting from a proposed transaction. As a part of this assessment, I encourage the OCC to seek as much detail as practicable from banks about their post-merger workforce retention and branching strategy and consider the potential negative impacts on workers and communities over a time horizon that reflects not just the short-term impact of a transaction, but the potential medium- and long-term effects as well.

However, when it comes to crucial issues like potential job losses and other factors that affect Americans' access to banking services, the OCC must do more than just give these issues some thought—the OCC must only approve mergers where it can identify how a proposed transaction is responsive to the whole of a bank's communities' needs, including those of both its customers and employees. The OCC cannot wave through mergers that only serve to enrich shareholders and executives while towns and small businesses across America lose access to critical banking services. Finally, in evaluating proposed mergers, I urge the OCC to give this component significant weight and, where appropriate, impose conditions on approval of applications to ensure the resulting institutions will serve their communities and employees, and not just executives and shareholders.

II. Transaction Review for GSIBs and Other Large Banks

The Policy Statement provides welcome guidance on how the OCC will factor bank size into its merger review process. Transactions that would result in an institution with less than $50 billion in total assets, assuming other indicators are also satisfied, would be consistent with approval.[8] In contrast, acquisitions by global systemically important banking organizations (GSIBs) would "raise supervisory or regulatory concerns."[9] This reform is critical as it codifies that mergers and acquisitions by the largest institutions will only be permitted under the *most* compelling of

[5] Board of Governors of the Federal Reserve System (Federal Reserve Board), "Perspectives from Main Street: Bank Branch Access in Rural Communities," Nov. 2019, https://www.federalreserve.gov/publications/november-2019-bank-branch-access-in-rural-communities.htm.
[6] *Id*.
[7] *Id*.; *see also*, Ruth Simon and Coulter Jones, "Goodbye, George Bailey: Decline of Rural Lending Crimps Small-Town Business," *Wall Street Journal,* Dec. 25, 2017, https://www.wsj.com/articles/goodbye-george-bailey-decline-of-rural-lending-crimps-small-town-business-1514219515.
[8] Policy Statement at 10016.
[9] *Id*. at 10012.

circumstances. GSIB transactions only further entrench "Too Big to Fail," increase the instability of our financial system,[10] reduce competition,[11] and diminish consumer choice.[12]

Capital One's proposed acquisition of Discover calls attention to an undefined space in the Policy Statement—the treatment of proposed transactions by institutions that are not GSIBs but will result in the formation of an institution with more than $50 billion in assets. The OCC has previously expressed concern about the financial stability risks that large, non-GSIB banks engaging in acquisitions present.[13] This merger would pair Capital One, the ninth largest bank in the country with $478 billion in assets, with Discover, the 27th largest bank with $150 billion in assets, to form the sixth largest commercial bank in the country with approximately $630 billion in assets. Proposed transactions of this magnitude should, as a matter of policy, automatically trigger enhanced scrutiny. Therefore, it is imperative that the Policy Statement clarifies that transactions undertaken by large, non-GSIB institutions would also raise supervisory or regulatory concerns.

III. Scrutiny of Rapid Growth

I also appreciate that the Policy Statement explains that the OCC will apply increased scrutiny to mergers where the acquirer "has experienced rapid growth" and engaged in multiple acquisitions with overlapping integration periods.[14] This is a sound and logical policy enhancement in the wake of Silicon Vally Bank's rapid growth prior to its failure last year—the bank's total assets doubled twice within a 5-year period, from just over $50 billion at the start of 2018 to more than $200 billion in 2021.[15] Banks should not be able to grow aggressively through acquisition to chase scale and profits at the expense of safe and sound risk management.

IV. Considering Competitive Effects

Under the Bank Merger Act, the OCC must consider a proposed merger's effect on competition.[16] However, the Policy Statement does not detail the OCC's approach to analyzing

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[10] *See* ACOC Hsu, "Financial Stability and Large Bank Resolvability," Apr. 1, 2022, https://www.occ.treas.gov/news-issuances/speeches/2022/pub-speech-2022-33.pdf.

[11] *See* Andrew P. Meyer, "Market Concentration and Its Impact on Community Banks," Federal Reserve Bank of St. Louis, Apr. 12, 2018, https://www.stlouisfed.org/publications/regional-economist/first-quarter-2018/concentration-community-banks.

[12] *See* Vitaly Bord, "Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors," Dec. 1, 2018, https://scholar.harvard.edu/files/vbord/files/vbord_-_bank_consolidation_and_financial_inclusion_full.pdf.

[13] *See*, *e.g.*, OCC, Ltr. Re: Application to merge MUFG Union Bank, National Association, San Francisco, California with and into U.S. Bank National Association, Cincinnati, Ohio (Oct. 14, 2022), https://www.occ.gov/news-issuances/news-releases/2022/nr-occ-2022-128a.pdf, at 4-5 ("Despite remaining substantially smaller than the global systemically important banks (GSIBs), the Resulting Bank would be large enough on an absolute basis to implicate resolution concerns… Should the Resulting Bank fail or experience significant financial distress, because of its size, there are a limited number of organizations that could acquire the Resulting Bank. For example, assuming that the Resulting Bank would need to merge with a larger institution, all of those potential merger partners are either GSIBs or subsidiaries of a GSIB. Thus, the limited options for resolvability given the size of the Resulting Bank and its potential acquirors could pose additional risk to the financial stability of the U.S. financial or banking system.").

[14] Policy Statement at 10013.

[15] Federal Reserve Board, Material Loss Review of Silicon Valley Bank, Sept. 25, 2023, at 12, https://oig.federalreserve.gov/reports/board-material-loss-review-silicon-valley-bank-sep2023.pdf.

[16] *See* 12 USC 1828(c)(5).

competitive effects, instead stating that the agency's assessments are guided by the interagency framework the banking regulators and the DOJ established in 1995.[17] Since 1995, the banking system has evolved considerably, most notably through the introduction of the internet and mobile banking. Unfortunately, the 1995 framework has not evolved with the banking system, and as a result it lacks the analytical framework to properly assess proposed transactions in the modern banking industry. For example, the 1995 framework only looks at deposits and branch locations, an approach that does not reflect modern banking.[18] Banks are now able to reach consumers well beyond their physical locations and offer consumers a wide variety of credit and deposit products. I appreciate that the OCC and the other banking regulators are working with the DOJ on updating the interagency competitive review framework, and hope that the agencies complete this work quickly.[19] Nevertheless, as a prudential regulator, the OCC should develop its own framework for conducting competitive analysis of proposed transactions. The agency has expertise and insights unique to the institutions it regulates and the products those institutions offer. That expertise should be drawn upon to develop a clear set of principles that will guide its competitive analysis of proposed transactions.

The final Policy Statement should clearly define a framework for the OCC's review of the competitive effects of proposed transactions. Consumers, communities, and small businesses deserve vigorous enforcement of banking and antitrust laws so that they can obtain access to affordable and high-quality options for banking services.

V. Public Input

Finally, the Policy Statement details the OCC's process for accepting and considering public input, which I have previously written to the OCC about, as a part of the merger review process.[20] Establishing a formal process for soliciting input from the public is critical to providing the public an opportunity to voice concerns about proposed transactions that could impact their jobs, finances, access to banking services, and communities. To strengthen the public input process even further, the OCC should not only offer a public forum but ensure that the infrastructure exists to conduct effective outreach to *all* potentially impacted communities to ensure they are aware of the opportunity to share their concerns about a proposed transaction. Additionally, the OCC should make the process for calling a public meeting more transparent, namely by establishing bright lines that would trigger a public meeting or hearing.

I look forward to seeing the OCC implement this section of the proposal. If bankers are offered the opportunity to sit down with the OCC to explain the merits of a merger—as the *Comptroller's Licensing Manual* for *Business Combinations* states—then so should representatives of impacted communities.[21]

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[17] DOJ, "Bank Merger Competitive Review – Introduction and Overview (1995)," https://www.justice.gov/atr/bank-merger-competitive-review-introduction-and-overview-1995.
[18] *See id*.
[19] ACOC Hsu, "What Should the U.S. Banking System Look Like? Diverse, Dynamic, and Balanced."
[20] Sen. Brown Ltr. to ACOC Hsu, Mar. 2, 2023, https://www.banking.senate.gov/newsroom/majority/brown-occ-bank-mergers-branch-closures-low-income-rural-minority-communities.
[21] OCC, Comptroller's Licensing Manual, "Business Combinations," July 2021, at 29, 53, https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/licensing-booklet-business-combinations.html.

VI. Closing

Over the last 40 years, the number of banks under the OCC's supervision has steadily declined while the largest institutions have acquired an ever-larger share of the nation's assets.[22] The six largest bank holding companies now control more assets than all others combined.[23] Even when the business case for individual mergers looks clear, these deals don't affect just executives or shareholders of individual banks—over time, they shape the banking sector as a whole, affecting the cost of credit and basic banking services that consumers, workers, and businesses rely on for their economic security. To ensure a competitive and stable financial system, the OCC should prioritize finalizing a strong rule and Policy Statement so that a clear set of principles are guiding the review and assessment of mergers and acquisitions. Further, the OCC should continue coordination with the other banking regulators to ensure that the agencies' respective analytical merger review frameworks are comprehensive and consistent.

Sincerely,

Sherrod Brown
Chairman
Senate Committee on Banking,
Housing, and Urban Affairs

cc: Chair Martin J. Gruenberg, Federal Deposit Insurance Corporation

[22] ACOC Hsu, "What Should the U.S. Banking System Look Like? Diverse, Dynamic, and Balanced," at 2.
[23] Jeremy Kress, "Reviving Bank Antitrust," *Duke Law Journal*, Dec. 2022, at 522, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4140&context=dlj; *see also,* Federal Financial Institutions Examination Council, Large Holding Company Data, https://www.ffiec.gov/npw/Institution/TopHoldings.